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(Resolutions, recommendations and opinions)

OPINIONS

EUROPEAN DATA PROTECTION SUPERVISOR

Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/.../JHA

(2009/C 42/01)

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty establishing the European Community, and in particular its Article 286,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular its Article 8,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, and in particular its Article 41,

Having regard to the request for an opinion in accordance with Article 28(2) of Regulation (EC) No 45/2001 sent to the EDPS on 27 May 2008,

HAS ADOPTED THE FOLLOWING OPINION:

I. INTRODUCTORY OBSERVATIONS

1. On 27 May 2008, the Commission adopted a Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2008/.../JHA (hereinafter: 'the proposal')⁽¹⁾. The proposal was sent by the Commission to the EDPS for consultation, in accordance with Article 28(2) of Regulation (EC) No 45/2001.

2. The proposal aims to implement Article 11 of the Council framework decision on the organisation and content of the exchange of information extracted from criminal records between Member States⁽²⁾ (hereinafter: the Council Framework Decision) in order to build and develop a computerized information-exchange system between Member States⁽³⁾. As set out in its Article 1, it establishes the European Criminal Records Information System (ECRIS) and it also sets up the elements of a standardised format for the electronic exchange of information, as well as other general and technical implementation aspects in order to organise and facilitate the exchanges of information.

3. The EDPS welcomes that he is consulted and recommends that reference to this consultation be made in the recitals of the proposal, in a similar way as in a number of other legislative texts on which the EDPS has been consulted, in accordance with Regulation (EC) No 45/2001.

II. BACKGROUND AND CONTEXT

4. The EDPS recalls that he issued an opinion on the Council Framework Decision on 29 May 2006. Some elements of this opinion that are worth recalling are:

— an emphasis on the importance of a standardised format as a means to preclude the ambiguity about the content of the information from the criminal record,

⁽²⁾ Not yet adopted; last text of proposal, as reworded by Council, available on the Public Register of the Council (Doc. 5968/08).

⁽³⁾ Recital 6 of the proposal.

⁽¹⁾ Doc. COM(2008) 332 final.

- support for the choices made in the Council Framework Decision not to provide for a centralized European database and not to allow direct access to databases which would be difficult to supervise,
 - application of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters on information extracted from criminal records, also in relation to transfers of personal data to third countries,
 - the efficiency of the exchange of information in a context of great differences between national legislation on criminal records, which requires additional provisions to make it work,
 - the division of responsibilities between the Member States and the difficulties arising from this division for adequate supervision. The designation of a central authority on national level was seen as positive,
 - the wide scope of the Council Framework Decision applying to all convictions transmitted to the criminal record.
5. These elements of the opinion of 2006 are still illustrative for the context in which the present proposal will be analysed. In particular, the divergence of national law on criminal records is determining for the context. This divergence calls for additional measures to make the system of exchange work. As such, the proposal for ECRIS is an additional measure. However, the context is also developing.
6. In the first place, the Council Framework Decision and its implementation in the proposal for ECRIS constitute one set of a number of new legal instruments aimed at facilitating the exchange of information between the Member States of the European Union for the purpose of law enforcement. They all give substance to the principle of availability, as introduced by the 2004 Hague Program⁽¹⁾. Where most of these instruments focus at police cooperation, this instrument is a means of judicial cooperation in criminal matters in the sense of Article 31 of the EU Treaty⁽²⁾. However, it has the same objective: facilitating the exchange of information for the purpose of law enforcement. In many cases, such instruments include or are supported by IT-systems and/or by the standardisation of exchange practices. The proposal for ECRIS is in this respect not unique. In the assessment of this proposal the EDPS benefits from earlier experiences with comparable instruments.
7. In the second place, the EU-legal framework for data protection is developing. The adoption of the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters (FDDP), referred to in recital 14 as the general framework applying in the context of computerised exchange of criminal records, is expected by the end of 2008. This Council Framework Decision will provide for minimum safeguards for data protection, in case personal data are or have been transmitted or made available between Member States⁽³⁾. This will lead to further convergence of national law on the conditions for the use of personal data (as meant in Article 9 of the Council Framework Decision *on the exchange of information from criminal records*).
8. In this context, it should be highlighted that negotiations on the FDDP have led to some changes, some of which are bound to specifically affect the legal framework in which the exchange of criminal records takes place:
- limitation of the scope of application, which now concerns only personal data exchanged with other Member States and no longer applies to data processed only domestically within one Member State,
 - no mechanisms of effective coordination between data protection authorities are provided.
9. Against this background, Article 9 of the Framework Decision on the exchange of criminal records — laying down some ‘conditions for the use of personal data’ — must be seen as a *lex specialis* on data protection, which provides additional guarantees to those laid down in the *lex generalis*, the FDDP. This Article — in particular its paragraphs 2 and 4 — specifies the purpose limitation principle with regard to the exchange of criminal records. It only allows exceptions to this principle in the circumstances explicitly mentioned in those provisions.
10. In the third place, closely linked to the present proposal, the Commission presented a Communication on a European e-Justice Strategy⁽⁴⁾. With this Communication, the European Commission intends to contribute to the reinforcement and development of e-justice tools at European level. The Communication contains a number of initiatives with significant impact on the protection of personal data, like for instance the creation of a network of secure exchanges for sharing information among judicial authorities and the creation of a European database of legal translators and interpreters. The EDPS intends to react to this Communication in a separate document.

⁽¹⁾ OJ C 53, 3.3.2005, p. 1.

⁽²⁾ The exchange of information through Eurojust is another example. The legal framework for this exchange will be modified, after the adoption of a Council Decision concerning the strengthening of Eurojust and amending Decision 2002/187/JHA (see Initiative published in OJ C 54, 27.2.2008, p. 4).

⁽³⁾ See Article 1 of the proposal for this Council Framework Decision (last text available on the Register of the Council, 24 June 2008, doc. 9260/08).

⁽⁴⁾ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Towards a European e-Justice Strategy, doc. COM(2008) 0329 final.

III. THE EXCHANGE OF INFORMATION FORESEEN IN THE COUNCIL FRAMEWORK DECISION

11. Article 11 of the Council Framework Decision describes what information must or may be transmitted (in its paragraph 1); it also provides in its paragraph 3 for the legal basis of the present proposal. Annex II of the Council Framework Decision lays down a form that must be used for the exchange. It includes information to be supplied by the requesting Member State and information that has to be given as a reply to the request. The form may be altered by a Council Decision, as now proposed by the Commission.
12. Article 11(1) distinguishes obligatory information, optional information, additional information and any other information. The form in Annex II does not reflect these distinctions. For example, the information on the convicted person's parents names is qualified in Article 11 as optional information that only must be transmitted if entered in the criminal records. Annex II does not reflect the optional nature of this transmission.
13. The EDPS suggests using the present occasion to fully modulate the form in conformity with Article 11. This will minimise the transmission of personal data to those that are really needed for the purpose of the exchange. In the example mentioned above, there does not seem to be a need to automatically transmit the names of parents of convicted persons. Doing so could unnecessarily harm the persons concerned, notably the parents.

IV. THE ECRIS SYSTEM

General remarks

14. Article 3 constitutes the core of the proposal. It establishes ECRIS based on a decentralised information technology architecture and consisting of three elements: data bases of criminal records in the Member States, common communication infrastructure and interconnection software.
15. The EDPS supports the present proposal to establish ECRIS, provided that the observations made in the present opinion are taken into account.
16. In this context, he underlines that on the one hand no central European database is established and no direct access to criminal records databases of other Member States is foreseen, whilst on the other hand on the national level the responsibilities are centralised with the central authorities of the Member States, designated under Article 3 of the Council Framework Decision. This mechanism limits the storage and exchange of personal data to a minimum, whilst it also clearly lays down the responsibilities for central authorities. Within this mechanism, Member States are responsible for the operation of national criminal records databases and for the efficient performance of the exchanges. Equally, they are responsible for the interconnection software (Article 3(2) of the proposal).
17. There will be a common infrastructure. Initially this will be the S-TESTA network ⁽¹⁾, which can be replaced by another secure network operated by the Commission (Article 3(4) of the proposal). The EDPS understands that the Commission is responsible for the common infrastructure, although this is not specified in Article 3. The EDPS suggests clarifying this responsibility in the text itself, for reasons of legal certainty.

The first element: databases of criminal records in the Member States

18. In his opinion of 29 May 2006, the EDPS expressed his support for a decentralised architecture. Amongst others, this avoids additional duplication of personal data in a central database. The choice for such a decentralised architecture automatically entails that the Member States are responsible for the criminal records databases and the processing of personal data within these databases. More specifically, the central authorities of the Member States are the controllers of those databases. They are as controllers responsible for the content of the databases and for the content of the information that is exchanged. The Council Framework Decision establishes the obligations of the convicting Member State and the Member State of the person's nationality.
19. Within this framework, ECRIS is a peer to peer network for the exchange of information between these national databases. A peer to peer network like ECRIS presents certain risks that have to be addressed:
- in practice, the division of responsibilities between the central authorities of the Member States does not work by itself. Additional measures are needed, for instance to ensure that the information kept by the sending and receiving Member State (state of conviction and state of nationality) are kept up to date and identical,
 - this architecture provokes a great diversity in the way it is applied by the different Member States, which is even more apparent in a context of great differences between national legislation (as is the case with criminal records).
20. Harmonisation of the use of the network itself, and the procedures around its use, is therefore paramount. The EDPS specifically notes the importance that all the use of the network takes place in a harmonised way, with high standards for data protection. The implementing measures that shall be adopted under Article 6 of the proposal are therefore of the utmost importance. The EDPS recommends that in Article 6 reference be made to a high level of data protection as a precondition for all the implementing measures to be adopted.

⁽¹⁾ Trans European Services for Telematics between Administrations.

21. The national data protection authorities could play a role in this context, provided that they operate in a harmonised way. The EDPS suggests that a recital be included emphasising the role of the data protection authorities, in a similar way as recital 11 and Article 3(5) note that the Commission assists the Member States. The new recital should also encourage the data protection authorities to cooperate.
22. Finally, the EDPS welcomes the provision in Article 3(3) to promote the use of Best Available Techniques in order to ensure the confidentiality and integrity of criminal records data sent to other Member States. However, it would be desirable that competent data protection authorities also be involved — together with (the central authorities of) the Member States and the Commission — in the identification of these techniques.

The second element: common communication infrastructure

23. The responsibility of the Commission for the common communication infrastructure entails that it must be seen as the provider of the network. For the purposes of data protection, the Commission can be qualified as a controller in the sense of Article 2(i) of the Council Framework Decision on the protection of personal data, albeit for a limited task: providing the network and ensuring its security. When personal data are processed in connection with the provision of the network or if data protection issues arise in connection with the security of the network, the Commission will be responsible as controller. This role of the Commission is comparable to its role in the SIS, VIS and Eurodac systems, namely that of the responsible for operational management (and not for the content of the personal data). This role was qualified as a 'sui generis controller' ⁽¹⁾.
24. The common communication infrastructure will be based on S-TESTA, at least in the shorter term. S-TESTA aims at interconnecting the EU bodies with national authorities, such as administrations and agencies spread across Europe. It is a dedicated telecommunication network. The Service Operation Centre is located in Bratislava. It also forms the backbone of other information systems in the Area of Freedom, Security and Justice, such as the Schengen Information System. The EDPS supports the choice for S-TESTA which has proved to be a reliable system for the exchange.
25. The responsibility of the Commission as a controller 'sui generis' also has consequences for the applicable data protection law and for the supervision. Article 3 of Regulation (EC) No 45/2001 lays down that this regulation 'shall

apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law'.

26. If all or part of the processing activities of the Commission would fall within the scope of Community law, there would be no doubt about the applicability of Regulation (EC) No 45/2001. In particular, Article 1 of this regulation provides that Community institutions and bodies shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. Under Article 22 of this regulation, the Commission shall have to 'implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected'. These activities take place under the supervision of the EDPS.
27. However, as to the present case and contrary to the Schengen Information System ⁽²⁾ it has to be noted that the legal basis of the processing activities lies within Title VI of the EU Treaty (the third pillar). This means that Regulation (EC) No 45/2001 does not automatically apply, nor does any other legal framework on data protection and on supervision apply to the processing activities of the Commission. This is unfortunate for the obvious reason of a lack of protection for the data subject, in particular since the processing of personal data relating to criminal convictions is of a sensitive nature, as is illustrated by Article 10(5) of Regulation (EC) No 45/2001 that qualifies processing relating to criminal convictions as processing operations likely to present specific risks. It is moreover unfortunate because the EDPS is — on the basis of other legal instruments — involved in the supervision on S-TESTA. It is for this reason that the EDPS proposes adding a provision to the decision ⁽³⁾ stating that Regulation (EC) No 45/2001 shall apply to the processing of personal data under the responsibility of the Commission.

The third element: interconnection software

28. The proposal distinguishes the common technical infrastructure for connecting the databases and the interconnection software. As said, the Member States are responsible for the interconnection software. According to recital 11, the Commission may provide this software but the Member States seem free to either apply that software instead of their own interconnection software or not.

⁽²⁾ And VIS and Eurodac which are fully systems within the scope of Community law.

⁽³⁾ See in the same sense in the third pillar Article 39(6) of the Council Decision establishing the European Police Office (Europol), ensuring the application of Regulation (EC) No 45/2001 to the processing of personal data relating to Europol staff (text of 24.6.2008, Council doc. 8706/08).

⁽¹⁾ See the Opinion of 19 October 2005 on three Proposals regarding the Second Generation Schengen Information System (SIS II) (OJ C 91, 19.4.2006, p. 38, paragraph 5.1).

29. The question arises why the responsibilities for the technical infrastructure and for connecting the software should be distinguished and why the Commission should not have a responsibility for both. Indeed, both cases deal with the network between the Central authorities of the Member States (the national access points to the network) and not with the information exchange within the Member States.

30. Giving this additional responsibility to the Commission would not affect the decentralised nature of the information technology architecture, whilst on the other hand the effectiveness of the exchange should be optimal. Enhancing the effectiveness is important from the perspective of data protection for reasons of data quality: only essential data have to be exchanged and there is no need for additional information because of imperfections within the system. It moreover allows better supervision of the system, if the responsibilities for the common communication infrastructure and the interconnection software are in one hand.

31. This is even more important in the light of the function of the software as a tool for exchange. Important features of the connection software are that it must be capable of checking the identity of the sender, as well as the compatibility and the integrity of requests, and as a consequence allow the validation of the requests. Interoperability of the software used by the Member States is therefore a prerequisite. Not all Member States must necessarily use the same software (although this would be the most practical option), but the software must be fully interoperable.

32. The proposal acknowledges the need for harmonisation of issues related to the interconnection software. The implementing measures listed in Article 6 — to be adopted by a Comitology procedure — include for instance 'procedures verifying the conformity of the software applications with the technical specifications'. Article 6 also mentions a common set of protocols. However, such a common set of protocols is not prescribed for the interconnection software. Article 6 does not foresee the identification of a software system either.

33. For the above reasons the EDPS recommends, in order to improve the effectiveness and the security of the exchanges, as follows:

— as a minimum, implementing measures shall be adopted ensuring the interoperability of the software,

— as preferred option, the text should oblige the Commission and the Member States — probably by a Comitology procedure — to develop or identify a software system that meets all the requirements, mentioned above,

— the text should lay down that the Commission will be responsible for the interconnection software.

V. OTHER ISSUES

The manual

34. Article 6(b) establishes that a manual to be adopted through the Comitology procedure will set out the procedure for the exchange of information, 'addressing in particular the modalities of identification of offenders'. The EDPS wonders precisely what this manual will include and if it for instance provides for identification by means of biometrics.

35. The EDPS emphasises that the identification of offenders should not lead to the exchange of personal data which are not explicitly laid down in the framework decision. Furthermore, the manual should lay down appropriate guarantees for the processing and the transmission of special categories of data, such as biometric data.

Collection of statistical data

36. Article 6(c) and Article 8 refer to the collection of statistical data, which represent a key element not only in assessing the efficiency of the system of data exchange but also in supervising the respect of data protection guarantees. Against this background, the EDPS recommends that, in line with other legal instruments relating to the exchange of personal data⁽¹⁾, the statistical elements to be collected are defined in further detail and duly take into account the need to ensure data protection supervision. For example, statistical data might explicitly include elements such as the number of requests for access or rectification of personal data, the length and the completeness of the update process, the quality of persons having access to these data as well as the cases of security breaches. Furthermore, statistical data and the reports based on them should be made fully available to competent data protection authorities.

Coordination of supervision of data processing

37. The EDPS has already highlighted, in his opinion of 29 May 2006 on the Framework decision on the exchange of criminal records, that the proposal should not only address the cooperation between the central authorities but also the cooperation between the various competent data protection authorities. This need has become even more important since the negotiations on the FDDP have led to the deletion of the provision establishing a working group reuniting EU data protection authorities and coordinating their activities with regard to the processing of data in the framework of police and judicial cooperation in criminal matters.

⁽¹⁾ See, for example, Articles 3(3) and 3(4) of Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

38. Therefore, with a view to ensure effective supervision as well as good quality of the trans border circulation of data extracted from criminal records, it would be necessary to establish appropriate mechanisms of coordination between competent data protection authorities. These mechanisms should also take into account the supervisory competence of the EDPS with regard to the S-TESTA infrastructure. These mechanisms could be included either in a specific provision or added to the implementing measures to be adopted pursuant to Article 6 of the proposal.

Translations

39. Recitals 6 and 8, as well as the Commission explanatory memorandum refer to the extensive use of automatic translation. While the EDPS welcomes any measures aimed at improving the mutual understanding of the information transmitted, he also points out that it is important to clearly define and circumscribe the use of the automatic translation. Indeed, once accurate pre-translations are made of the offence categories set out in the Annex to the decision, the use of the common codes will allow national authorities to read the automatic translation of these categories in their national language. This use of automatic translation is a useful instrument and is likely to favour mutual understanding of criminal offences at stake.

40. However, the use of automatic translation for the transmission of information which has not been accurately pre-translated, such as additional comments or specifications added in individual cases, is likely to affect the quality of the information transmitted — and thus of the decisions taken on their basis — and should in principle be excluded. The EDPS recommends specifying this issue in the recitals of the Council Decision.

VI. CONCLUSIONS

41. The EDPS recommends that reference to this consultation be made in the recitals of the proposal
42. It is suggested that the present occasion be used to fully modulate the form in conformity with Article 11 of the Council Framework Decision on criminal records which distinguishes obligatory information, optional information, additional information and any other information.

43. The EDPS supports the present proposal to establish ECRIS, provided that the observations made in this opinion are taken into account, which includes:

- the responsibility of the Commission for the common communication infrastructure should be clarified in the text for reasons of legal certainty,
- a provision should be added to the decision stating that Regulation (EC) No 45/2001 shall apply to the processing of personal data under the responsibility of the Commission,
- in Article 6 reference must be made to a high level of data protection as a precondition for all the implementing measures to be adopted,
- a recital should emphasise the role of the data protection authorities in relation to the implementing measures and should also encourage the data protection authorities to cooperate,
- implementing measures must be adopted ensuring the interoperability of the software,
- the Commission and the Member States should be obliged — probably by a Comitology procedure — to develop or identify a software system that meets all the requirements,
- it should be laid down in the text that the Commission will be responsible for the interconnection software.

44. The statistical elements to be collected should be defined in further detail and duly take into account the need to ensure data protection supervision.

45. Appropriate mechanisms of coordination between competent data protection authorities should be established, taking into account the supervisory competence of the EDPS with regard to the S-TESTA infrastructure.

46. In the recitals of the Council Decision it should be specified that the use of automatic translation should not extend to the transmission of information which has not been accurately pre-translated.

Done in Brussels, 16 September 2008.

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